



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

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SEP 9 2010

Mr. Scott H. Strauss, Esq.  
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Spiegel & McDiarmid, LLP  
1333 New Hampshire Avenue, NW  
Washington, DC 20036

RE: MUR 6100R  
Utility Workers Union of America,  
Local 369, AFL-CIO

Dear Mr. Strauss:

This is in reference to the complaint your clients, Utility Workers Union of America, Local 369, AFL-CIO ("UWU"), filed with the Federal Election Commission ("the Commission") on October 20, 2008, with respect to the Covanta Energy Corporation and Covanta Energy Corporation Political Action Fund and Joanne Pagliuca, in her official capacity as treasurer. The complaint in MUR 6100 alleged, *inter alia*, that Covanta Energy Corporation unlawfully solicited contributions for its federal PAC through a section of Covanta's employee handbook entitled "Political Contributions/Lobbying." The Commission first considered this matter on April 2, 2009, and the Commission found, based upon information provided in the complaint and response, that there was no reason to believe that Covanta or Covanta Energy Corporation Political Action Fund and Joanne Pagliuca, in her official capacity as treasurer, violated 11 C.F.R. § 114.6. The Commission approved a Final and Legri Analysis ("F&LA") previously provided to your clients, and closed its file in this matter.

UWU filed suit for judicial review of the dismissal of their administrative complaint, *see Utility Workers Union of America, Local 369, AFL-CIO v. FEC*, No. 09-01022 (D.D.C.), and the case was remanded back to the Commission for further proceedings consistent with the accompanying Memorandum Opinion. The district court remand, on March 8, 2010, directed the Commission to provide further explanation consistent with the court's conclusion that the Commission had failed to address an Explanation and Justification ("E&J") for 11 C.F.R. § 114.5(j).

The attached supplemental F&LA is in response to the court's remand and includes an explanation of how the Commission's determination in MUR 6100 is consistent with the Commission's E&J. Documents related to the case will be placed in

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the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). If you have any questions, please contact me at (202) 694-1650.

Sincerely,

*for April Sands by Rhine*

April Sands  
Attorney

Attachment  
Supplemental Factual and Legal Analysis

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**FEDERAL ELECTION COMMISSION**  
**FACTUAL AND LEGAL ANALYSIS**  
**MUR 6100R**

**RESPONDENTS:** Covanta Energy Corporation ("Covanta")  
Covanta Energy Corporation Political Action Fund  
and Joanne Pagliuca, in her official capacity  
as treasurer ("PAC")

**I. INTRODUCTION**

The Commission issues this supplemental Factual and Legal Analysis following the remand by the United States District Court for the District of Columbia of *Utility Workers Union of America, Local 369, AFL-CIO v. FEC*, a case brought under 2 U.S.C. § 437g(a)(8) by the complainant in MUR 6100. The complaint in MUR 6100 alleged, *inter alia*, that Covanta Energy Corporation unlawfully solicited contributions for its federal PAC through a section of Covanta's employee handbook entitled "Political Contributions/Lobbying." The Commission found no reason to believe that Covanta or its PAC violated 11 C.F.R. § 114.6, the regulation addressing a corporation's solicitation of employees outside the restricted class,<sup>1</sup> and approved a Factual and Legal Analysis ("F&LA") addressed to Covanta and its PAC.

The district court found that the Explanation and Justification ("E&J") for 11 C.F.R. § 114.5(j) — which specifies that a solicitation takes place when a PAC informs persons outside its restricted class of its right to accept their contributions — appeared to be implicated by the facts in the administrative complaint. Slip op. at 4 (Mar. 8, 2010). The court found that the Commission's failure to address the E&J explicitly in its analysis was contrary to law; the court

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<sup>1</sup> Under the Act and Commission regulations, a corporation or separate segregated fund ("SSF") established by a corporation may solicit contributions to the SSF from the corporation's "restricted class," which consists of the corporation's executive and administrative personnel, its stockholders, and their families. 2 U.S.C. § 441b(b)(4); 11 C.F.R. §§ 114.1(c) and 114.5(g). Solicitations beyond the restricted class are generally prohibited. 2 U.S.C. § 441b(b)(4)(A).

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1 remanded the case to give the Commission an opportunity to reconcile its determination with the  
2 E&J. *Id.* at 5, 8, 11.

3 **II. ANALYSIS**

4 **A. The Covanta handbook does not fall within the E&J**  
5 **example of a solicitation.**

6  
7 The Covanta Policy of Business Conduct ("Handbook") states in relevant part:

8 Primarily in order to make contributions to federal political  
9 candidates or committees, we have established a federal political  
10 action committee (or "PAC"). Contributions to the PAC by  
11 eligible employees are voluntary. Whether an employee  
12 contributes or not results in no favor, disfavor or reprisal from  
13 Covanta. The PAC will comply with all related federal and state  
14 laws.

15  
16 Handbook at page 11.

17 Section 114.5(j) of the Commission's regulations provides generally that a separate  
18 segregated fund ("SSF") may accept unsolicited contributions from persons outside the restricted  
19 class. 11 C.F.R. § 114.5(j). That regulation's E&J, however, explains that "[i]nforming persons  
20 of the right to accept such contributions is . . . a solicitation." E&J, H.R. Doc. No. 95-44, 109  
21 (Jan. 12, 1977). Moreover, the Act also requires corporations and unions to ensure that  
22 contributions to their SSFs are voluntary. *See* 2 U.S.C. § 441b(b)(3); 11 C.F.R. § 114.5(a).  
23 Here, the specific language of the Covanta handbook does not fall within the E&J because it  
24 does not clearly inform persons outside the PAC's restricted class that the PAC has the right to  
25 accept their unsolicited contributions. Rather, in context this portion of the handbook appears to  
26 be an attempt to comply with the company's legal obligation to ensure that contributions to its  
27 SSF are voluntary. *See also infra* Section C. The sentence centrally at issue states that  
28 "[c]ontributions to the PAC by eligible employees are voluntary." The most natural reading of

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1 this sentence is that some employees are *not* “eligible” to contribute to the Covanta PAC. Thus,  
2 at most, this sentence may raise questions about *which* employees are “eligible” to make such  
3 “voluntary” contributions. The sentence makes no reference to “all employees” or even just  
4 “employees” generally. And it does not explicitly or even implicitly purport to inform  
5 employees outside the restricted class that the PAC has a right to accept their unsolicited  
6 contributions, let alone inform such unsolicitable employees that they “may make” voluntary  
7 contributions to the PAC.

8 When a communication does not clearly inform persons outside the restricted class of  
9 their right to make a contribution to a PAC (or of a PAC’s right to accept their unsolicited  
10 contributions), the context of the communication is relevant to whether it constitutes a  
11 solicitation. Indeed, the “encourage” or “facilitate” analysis of potential solicitations in  
12 numerous Commission Advisory Opinions necessarily considers the context of communications.  
13 *See, e.g.*, Advisory Opinion 1983-38 (proposed communications containing factual matters about  
14 SSF, including voluntary nature and political purpose of fund, may “engender some inquiries”  
15 but do not encourage or facilitate participation in fund, praise employees for contributing, or  
16 inform readers that unsolicited contributions from persons outside restricted class would be  
17 accepted); Advisory Opinion 2000-07 (communication (i) describing generally corporate SSFs  
18 and the laws applicable to them, (ii) referring to the corporation’s support for the SSF, and  
19 (iii) stating that employees desiring additional information on their eligibility may contact the  
20 PAC, merely conveys information that might engender inquiry and is not an encouragement to  
21 contribute).

22 Similarly, although the Commission has not previously defined the scope of the E&J for  
23 11 C.F.R. § 114.5(j), the Commission has analyzed the sentence in the Covanta handbook in

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1 context and concluded that it was not a solicitation. The sentence at issue — “Contributions to  
2 the PAC by eligible employees are voluntary.” — appeared in a 26-page employee handbook  
3 addressing employer and employee rights and responsibilities with respect to 35 separate  
4 compliance topics. The sentence at issue appeared in the last of five paragraphs in the “Political  
5 Contributions” section, which outlined a variety of matters related to the rights and obligations of  
6 Covanta employees in connection with political activities undertaken while on the job. The  
7 sentence was followed by two additional sentences stating that “Whether an employee  
8 contributes or not results in no favor, disfavor or reprisal from Covanta. The PAC will comply  
9 with all related federal and state laws.” Handbook at 11.

10 This context suggests that the sentence was merely part of Covanta’s attempt to comply  
11 with its legal obligation to ensure that contributions to its SSF are voluntary. *See* 2 U.S.C.  
12 § 441b(b)(3); 11 C.F.R. § 114.5(a). The language does not appear to implicitly seek  
13 contributions from persons outside the restricted class, nor does it do so explicitly. A  
14 corporation or its SSF cannot, of course, transform a true solicitation into something else simply  
15 by placing it in the midst of a voluminous document covering other subjects, or by embedding it  
16 in a discussion of legal rights or responsibilities. The particular language at issue in the Covanta  
17 handbook, however, is a logical part of the handbook’s explanation of employees’ rights and  
18 responsibilities.

19 While the Covanta handbook could have been phrased more precisely to avoid any  
20 possible confusion — for example, by explaining that “eligible employees” are those employees  
21 within Covanta’s restricted class — the sentence at issue was not a solicitation of unsolicitable  
22 individuals under the E&J or any other Commission decision. The sentence does not on its face  
23 inform persons outside the restricted class of the Covanta PAC’s right to accept their unsolicited

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1 contributions, and it neither encouraged nor facilitated contributions to the Covanta PAC.  
2 Moreover, when viewed in the context of the rest of the "Political Contributions" section as well  
3 as the Covanta handbook as a whole, the sentence appears to be a statement of Covanta's  
4 compliance with 2 U.S.C. § 441b(b)(3) and 11 C.F.R. § 114.5(a) (both prohibiting PACs from  
5 utilizing contributions secured through force or duress), rather than a disguised solicitation for  
6 contributions.

7 **B. The conclusion that the Covanta handbook is not a solicitation**  
8 **is consistent with numerous Advisory Opinions.**  
9

10 As discussed in the original F&LA for MUR 6100, numerous Commission Advisory  
11 Opinions have addressed whether certain proposed communications would "encourage" or  
12 "facilitate" contributions. *See* MUR 6100 F&LA. Under the analyses in these Advisory  
13 Opinions, the Covanta handbook does neither. *See id.* at 4. Though not stated explicitly in past  
14 advisory opinions, informing persons outside the restricted class of the PAC's right to accept  
15 their unsolicited contributions is itself an indicator that a communication is a form of  
16 encouragement. The "encourage" or "facilitate" analysis thus is consistent with the E&J.

17 The original F&LA in MUR 6100 concluded that "the language in Covanta's employee  
18 handbook does not rise to the level of a solicitation because it does not encourage support for the  
19 PAC or facilitate the making of contributions to the PAC." MUR 6100 F&LA at 4 (citing  
20 Advisory Opinions 2003-14, 2000-7, 1991-3, 1988-2, 1983-38, and 1982-65). Although past  
21 Commission Advisory Opinions have, on occasion, referenced the E&J, they have done so  
22 without explaining the scope of the E&J. For example, in Advisory Opinion 1983-38, in which  
23 the Commission addressed whether a company's announcement in a company publication of the  
24 establishment of its PAC constituted a solicitation for contributions to the PAC, the Commission

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1 cited both the “encourage” or “facilitate” analysis and also the E&J description of “solicitation.”  
2 The proposed announcement stated that the PAC would solicit funds only from the restricted  
3 class, while separately stating that “[u]nder the law . . . steps must be taken to ensure that  
4 employee contributions to the Fund are strictly voluntary and without coercion.” The Advisory  
5 Opinion concluded that the proposed announcement did not “praise employees for making  
6 contributions, encourage their participation, or facilitate the making of contributions.” It further  
7 concluded, without any analysis of the E&J, that the proposed announcement did not “inform the  
8 reader that unsolicited contributions from nonexecutive . . . employees . . . w[ould] be accepted”  
9 by the PAC. *See also* Advisory Opinion 1992-09 at n.5 & accompanying text (invoking the  
10 “encourage” or “facilitate” analysis and noting in a footnote the existence of the E&J for  
11 § 114.5(j)).

12 As the district court noted, there were several advisory opinions that were “issued  
13 contemporaneously with the E&J”: Advisory Opinion 1978-97, Advisory Opinion 1976-27, and  
14 Advisory Opinion 1976-96. *See slip op.* at 5. Those advisory opinions, however, are inapposite.  
15 They did not establish or invoke any particular interpretation of the E&J, involve a factual  
16 scenario analogous to the facts at issue here, or otherwise provide a clear basis for construing the  
17 Covanta handbook language as a solicitation.

18 Advisory Opinion 1978-97, the only one of these advisory opinions issued *after* the E&J,  
19 did not involve the question of whether a communication was a solicitation; instead, it addressed  
20 whether a disclaimer or “caveat” in an admitted solicitation was sufficient to deem recipients  
21 outside the restricted class as excluded from the solicitation. In a footnote, the Commission cited  
22 11 C.F.R. § 114.5(j) and noted that “[p]ast advisory opinions of the Commission have concluded  
23 that a contribution solicitation *may occur* in many types of communications which do not

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1 explicitly request the making of a contribution but nevertheless give notice to the communication  
2 recipient that a specific PAC exists to accept and make contributions.” *See* Advisory Opinion  
3 1978-97, at 1-2 n.2 (emphasis added). The Commission nowhere indicated, however, that a  
4 solicitation necessarily *would* occur whenever a communication simply gives notice to its  
5 recipient that a PAC exists to accept and make contributions.

6 The court also cited two advisory opinions that pre-dated the E&J, both of which  
7 addressed an issue not raised by the circumstances here:— whether communications about  
8 specific fundraising events or activities, the proceeds of which would benefit a particular PAC,  
9 constituted solicitations. *See* Advisory Opinions 1976-27 and 1976-96.

10 In Advisory Opinion 1976-27, the Commission concluded that a communication  
11 informing people about a specific fundraising cocktail party to benefit a PAC constituted a  
12 solicitation, because “[t]he solicitation process includes asking persons to purchase tickets to  
13 fundraisers and providing persons with information about a fundraising activity.” Advisory  
14 Opinion 1976-27, at 2.

15 The Commission reached a similar conclusion in Advisory Opinion 1976-96, which  
16 involved a proposed presentation at an annual trade association meeting that would include a ten-  
17 minute speech by the chairman of the trade association’s PAC. He planned to speak about the  
18 PAC’s ongoing solicitation drive to an audience that included some individuals whom it was  
19 impermissible to solicit. The Advisory Opinion explained that “informing persons of a  
20 fundraising activity is considered a solicitation,” citing Advisory Opinion 1976-27, and  
21 concluded “accordingly . . . that if an announcement of PAC activities is made at [the annual  
22 trade association] meeting, or if the PAC sets up and informs the attendees of a booth on the  
23 premises where solicitation materials are available, either event would be a ‘solicitation’ within

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1 the meaning of the Act, and would therefore require prior approval from the corporate  
2 members.” Advisory Opinion 1976-96, at 2, 3.

3 Neither the notice about the fundraising cocktail party at issue in Advisory Opinion  
4 1976-27, nor the proposed presentation by a PAC chairman about PAC fundraising activities in  
5 Advisory Opinion 1976-96 is analogous to the content of the Covanta handbook. While the  
6 communications at issue in Advisory Opinions 1976-27 and 1976-96 both involved discussion of  
7 specific fundraising activities, the Covanta handbook does not mention any particular fundraising  
8 event or even general fundraising activities to benefit the Covanta PAC. The Advisory Opinions  
9 from the 1970s cited above have no bearing on the Commission’s determination here.

10 Moreover, the Commission has explained generally that communications that simply  
11 provide certain basic information about a PAC, such as total contributions made or received in  
12 the past, the number of past recipient candidates, and the identification of past recipient  
13 candidates “without further language of encouragement ha[ve] not been construed [by the  
14 Commission] to be a solicitation.” Advisory Opinion 2000-7 at 4. In Advisory Opinion 2000-7,  
15 the Commission thus concluded specifically that a statement “that employees desiring additional  
16 information on their eligibility [to participate in a particular PAC] or about [that] PAC’s  
17 activities may contact the PAC . . . merely conveys information that might engender inquiry” and  
18 is not a solicitation. *Id.* at 5. The language in the Covanta handbook provides less information  
19 about the PAC’s fundraising than the communication at issue in Advisory Opinion 2000-7. *Id.* at  
20 2-3, 5.

21 In sum, as indicated in the original F&LA for MUR 6100, the Commission’s analysis of  
22 several relevant — and more recent — Advisory Opinions led to the conclusion that the  
23 language in the Covanta handbook did not constitute a solicitation.

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**C. Permitting the language in the Covanta handbook helps ensure that contributions to SSFs are voluntary.**

The Commission's conclusion here reflects important policy considerations. An interpretation of the E&J that construes as a solicitation all communications similar to the Covanta handbook would undermine the fundamental purpose of statutory and regulatory provisions that require corporations and their SSFs to ensure that any contributions to SSFs are voluntary. *See* 2 U.S.C. § 441b(b)(3) and 11 C.F.R. § 114.5(a). Such a construction could discourage corporations and unions from undertaking good faith efforts to promote the need for voluntariness and for the absence of coercion or undue influence in any communication other than one in which a solicitation is made. As the Commission has explained, section 114.5(a) of the Commission's regulations was promulgated to "ensur[e] the voluntary nature of contributions to separate segregated funds." Advisory Opinion 2003-06; *see also* Advisory Opinion 1996-18 fn. 3 at 3 (observing "the importance of ensuring that any contributions solicited for [an SSF] [are] voluntary and that no penalty attach[es] to any person who decides not to make a contribution"). Some corporate and union communications that contain a discussion of legal matters related to PAC contributions *and* other indicia of a solicitation would in context constitute a solicitation. The mere statement in Covanta's employee handbook that "[c]ontributions to the PAC by eligible employees are voluntary," however, helps to ensure that such contributions are voluntary.

**D. Additional handbook language.**

Although the primary sentence analyzed in this F&LA was the central focus of the complainant's claims, the handbook also states in an earlier paragraph, "In general, employees are free to make a personal contribution to any political candidate or committee as an individual

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1 and not as a representative of Covanta, subject to the individual limitations under state or federal  
2 law.” Handbook at page 11. During the litigation — but not in its administrative complaint —  
3 the complainant also invoked this earlier sentence as purported support for its claim that the  
4 Covanta handbook contained a solicitation for contributions to the Covanta PAC. In fact, the  
5 fairest reading of this sentence is as a caveat about certain legal restrictions, identified in the  
6 succeeding sentences, applicable to candidate contributions by Covanta board members and  
7 officers — “as . . . individual[s] and not as . . . representative[s] of Covanta” — in connection  
8 with non-federal elections in certain states. The sentence makes no mention of the Covanta  
9 PAC, which is not even identified until two paragraphs later. Moreover, in addition to expressly  
10 referencing employees’ “personal contribution[s]” rather than those made “as a representative of  
11 Covanta,” the context of the paragraph in which the sentence appears undercuts the  
12 complainant’s inference that the sentence is implicitly referencing contributions to the Covanta  
13 PAC; the sentence is more fairly read as referencing employees’ personal contributions to  
14 candidates and candidate committees. Thus, to the extent the complainant relies on that  
15 sentence, the Commission concludes that it does not constitute a solicitation, whether viewed in  
16 isolation or when read in conjunction with other portions of the handbook.

17 Finally, the Commission notes that it does not revisit the other statements in the Covanta  
18 handbook that, the district court concluded, “the FEC reasonably determined” do not “amount to  
19 solicitations of contributions to the PAC.” See slip op. at 6 n.6.

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